IRAQ: LEGAL BACKGROUND

(i) Use of Force: (a) Security Council Resolutions
(b) Self-defence
(c) Humanitarian Intervention

(ii) No Fly Zones

(iii) Security Council Resolutions relevant to the sanctions regime

(iv) Security Council Resolutions relating to UNMOVIC

(i) Use of Force: (a) Security Council Resolutions relevant to the Authorisation of the Use of Force

1 Following its invasion and annexation of Kuwait, the Security Council authorised the use of force agaisnt Iraq in resolution 678(1990); this resolution authorised coalition forces to use all necessary means to force Iraq to withdraw, and to restore international peace and security in the area. This resolution gave a legal basis for Operation Desert Storm, which was brought to an end by the cease-fire set out by the Council in resolution 687 (1991). The conditions for the cease-fire in that resolution (and subsequent resolutions) imposed obligations on Iraq with regard to the elimination of WMD and monitoring of its obligations. Resolution 687 (1991) suspended but did not terminate the authority to use force in resolution 678 (1990).

2 In the UK's view a violation of Iraq's obligations which undermines the basis of the cease-fire in resolution 687 (1991) can revive the authorisation to use force in resolution 678 (1990). As the cease-fire was proclaimed by the Council in resolution 687 (1991), it is for the Council to assess whether any such breach of those obligations has occurred. The US have a rather different view: they maintain that the

assessment of breach is for individual member States. We are not aware of any other State which supports this view.

3 The authorisation to use force contained in resolution 678 (1990) has been revived in this way on certain occasions. For example, when Iraq refused to cooperate with the UN Special Commission (UNSCOM) in 1997/8, a series of SCRs condemned the decision as unacceptable. In resolution 1205 (1998) the Council condemned Iraq's decision to end all co-operation with UNSCOM as a flagrant violation of Iraq's obligations under resolution 687 (1991), and restated that the effective operation of UNSCOM was essential for the implementation of that Resolution. In our view these resolutions had the effect of causing the authorisation to use force in resolution 678 (1991) to revive, which provided a legal basis for Operation Desert Fox. In a letter to the President of the Security Council in 1998 we stated that the objective of that operation was to seek compliance by Iraq with the obligations laid down by the Council, that the operation was undertaken only when it became apparent that there was no other way of achieving compliance by Iraq, and that the action was limited to what was necessary to secure this objective.

4 The more difficult issue is whether we are still able to rely on the same legal base for the use of force more than three years after the adoption of resolution 1205 (1998). Military action in 1998 (and on previous occasions) followed on from specific decisions of the Council; there has now not been any significant decision by the Council since 1998. Our interpretation of resolution 1205 was controversial anyway;

many of our partners did not think the legal basis was sufficient as the authority to use force was no explicit. Reliance on it now would be unlikely to receive any support.

USE OF FORCE: (B) SELF-DEFENCE

5 The conditions that have to be met for the exercise of the right of self-defence are well-known:

i) There must be an armed attack upon a State or such an attack must be imminent;

ii) The use of force must be necessary and other means to reverse/ avert the attack must be unavailable;

iii) The acts in self-defence must be proportionate and strictly confined to the object of stopping the attack.

The right of self-defence may only be exercised until the Security Council has taken measures necessary to ensure international peace and security" and anythign done in exercise fo the right of self-defence must be immediately reported to the Council.

6 For the exercise of the right of self-defence there must be more than "a threat". There has to be an armed attack" actual or imminent. The development of possession of nuclear weapons does not in itself amount to an armed attack; what would be needed

would be clear evidence of an imminent attack. During the Cold War[1] there was certainly a threat in the sense that various States had nuclear weapons which they might, at short notice[1] unleash upon each other. But that did not mean the mere possession of nuclear weapons, or indeed their possession in time of high tension or attempt to obtain them[1], was sufficient to justify pre-emptive action. And when Israel attacked an Iraqi nuclear reactor, near Baghdad, on 7 June 1981 it was "strongly condemned" by the Security Council (acting unanimously) as a "military attack .... in clear violation of the Charter of the United Nations and the norms of international conduct".

USE OF FORCE: (C) HUMANITARIAN INTERVENTION

7 In the UK view[1] the use of force may be justified if the action is taken to prevent an overwhelming humanitarian catastrophe. The limits to this highly contentious doctrine are not clearly defined, but we would maintain that the catastrophe must be clear and well documented, that there must be no other means short of the use of force which could prevent it, and that the measures taken must be proportionate. This doctrine partly underlies the very limited action taken by allied aircraft to patrol the No Fly Zones in Iraq (following action by Saddam to repress the Kurds and the Shia in the early 90s), which involves occasional and limited use of force by those aircraft in self-defence. The application of this doctrine depends on the circumstances at any given time, but it is clearly exceptional.

(II) NO FLY ZONES (NFZs)

8 The NFZs over Northern and Southern Iraq are not established by UN Security Council Resolutions. They were established in 1991 and 1992 on the basis that they were necessary and proportionate steps taken to prevent a huminitarian crisis. Prior to the establishment of the Northern NFZ the Security Council had adopted resolution 688 (1991) on 5 April 1991 in which the Council stated that it was gravely concerned by the repression of the Iraqi civilian population in many parts of Iraq,[1] including most recently in Kurdish populated areas, which had led to a massive refugee flow[1] and that it was deeply disturbed by the magnitude of the human sufering involved. The resolution condemned that repression of the Iraqi civilian population and demanded that Iraq immediately end the repression. In our view the purpose of the NFZs is to moniter Iraqi compliance with the provisions of resolution 688. UK and US aircraft patrolling the NFZs are entitled to use force in self-defence where such a use of foce is a necessary and proportionate response to actual or imminent attack from Iraqi ground systems.

9 The US have on occasion claimed that the purpose of the NFZs is to enforce Iraqi compliance with resolutions 687 or 688. This view is not consisent with resolution 687, which does not deal with the repression of the Iraqi civilian population, or with resolution 688, which was not adopted under Chapter VII of the UN Charter[1] and does not contain any provision for enforcement. Nor (as it is sometimes claimed)

were the current NFZs provided for in the Safwan agreement, a provisional agreement between coalition and Iraqi military commanders of 3 March 1991, laying down military conditions for the cease-fire which did not contain any reference to the NFZs.

(III) SECURITY COUNCIL RESOLUTIONS RELEVANT TO THE SANCTIONS REGIME

10 The sanctions regime against Iraq was established by resolution 661 (1990) of 6 August 1990, which, following the invasion of Kuwait by Iraq, decides that all states shall prevent the import into their territories of any commodities originating in Iraq, the sale or supply to Iraq of any commodities other than medical supplies, and, in humanitarian circumstances, food stuffs, and that Iraqi funds and financial resources should be frozen. Resolution 661 remains in force. The major exception to the sanctions regime is the oil for food programme[1] which was established by resolution 986 (1995) and permits oil exports (in unlimited amounts following resolution 1284 (1999)) by Iraq on condition that the purchase price is paid into an escrow account established by the UN Secretary-General, and the funds in that account are used to meet the humanitarian needs of the Iraqi people through the export of medicine, health supplies, foodstuffs and materials and supplies for essential civilian needs. The escrow account is also used to fund the Un Compensation Commission and to meet the operating costs of the UN, includign those of UNMOVIC (see below).

11 The oil for food programme is renewed by the Security Council at (usually) 6 monthly intervals, most recently by resolution 1382 (2001) of 29 November 2001.

Under that resolution the Council also decided that it would adopt, by 13 May 2002, procedures which would improve the flow of goods to Iraq, other than arms and other potential dual use goods on a Goods Review List. The US are currently reviewing the final details of the list with the Russians.

12 In resolution 687 (1991) the Council decided that the prohibition against the import of goods from Iraq should have no further force when Iraq has completed all the actions contemplated in paragraphs 8-13 of that resolution concerning Iraq's WMD programme. Iraq has still not complied with this condition. Under paragraph 21 of resolution 687, the Council decided to review the prohibition against the supply of commodities to Iraq every 60 days in the light of the policies and practices of the Iraqi government, including the implementation of all the relevant resolutions of the Council, for the purpose of determining whether to reduce or lift them. These regular reviews are currently suspended as a result of Iraqi non-compliance with the Council's demands.

13 The intention of the Council to act in accordance with resolution 687 on the termination of these prohibitions has been regularly reaffirmed, including in resolution 1284 (1999). Paragraph 33 of that resolution also contains a complex formula for the suspension of economic sanctions against Iraq for renewable periods of 120 days, if UNMOVIC and the IAEA report cooperation in all respects by Iraq in fulfilling work programmes with those bodies for a period of 120 days after a

reinforced system of monitoring and verification in Iraq becomes fully operational. Iraq has never complied with these conditions.

(iv) SECURITY COUNCIL RESOLUTIONS RELATING TO UNMOVIC

14 UNMOVIC was established by resolution 1284 (1999) to replace the UN Special Commission (UNSCOM) established under resolution 687 (1991) (the ceasefire resolution). UNMOVIC is to undertake the responsibilities of the former Special Commission under resolution 687 relating to the destruction of Iraqi CBW and ballistic missiles with a range of over 150 kilometres and the on-going monitoring and verification of Iraq]s compliance with these obligations. Like the Special Commission, UNMOVIC is to be allowed unconditional access to all Iraqi facilities, equipment and records as well as to Iraqi officials. Under pragraph 7 of resolution 1284 UNMOVIC and the IAEA were given the responsibility of drawing up a work programme which would include the implementation of a reinforced system of ongoing monitoring and verification (OMV) and key remaining disarmament tasks to be completed by Iraq, which constitute the governing standard of Iraqi compliance. There are currently no UNMOVIC personnel in Iraq, and the reinforced OMV system has not been implemented because of IRaq's refusal to cooperate.